

IN THE SUPREME COURT OF THE STATE OF DELAWARE

LAWRENCE JOHNSON,	§	
	§	No. 654, 2010
Defendant Below,	§	
Appellant,	§	Court Below—Superior Court
	§	of the State of Delaware in and
v.	§	for New Castle County
	§	
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	Cr. ID No. 9506017339
Appellee.	§	

Submitted: August 26, 2011

Decided: August 31, 2011

Before **HOLLAND, BERGER** and **JACOBS**, Justices.

O R D E R

This 31st day of August 2011, upon consideration of the briefs of the parties, the Superior Court record, and the parties' responses to the Clerk's letter of August 11, 2011, it appears to the Court that:¹

(1) In 1996 after a Superior Court jury trial, the appellant, Lawrence Johnson, was convicted of felony murder, burglary, robbery, and

¹ Upon review of the Superior Court docket in this *pro se* appeal from the denial of the appellant's third motion for postconviction relief, the Court noted that the appellant, through counsel, had, during the pendency of this appeal, filed a fourth motion for postconviction relief, and that the parties had filed a stipulation regarding that motion that was approved by the Superior Court. By letter dated August 11, 2011, at the direction of the Court, the Clerk asked the parties whether, in view of the motion pending in the Superior Court, this appeal should be voluntarily dismissed by stipulation under Supreme Court Rule 29(a). In separate responses to the Clerk's letter, the *pro se* appellant and counsel for the appellee, State of Delaware, each indicated their opposition to a voluntary dismissal of this appeal under Rule 29(a).

related weapon offenses. On direct appeal, the judgment of the Superior Court was affirmed.²

(2) Johnson has filed this appeal from the Superior Court's September 23, 2010 order denying his third motion for postconviction relief pursuant to Superior Court Criminal Rule 61 ("Rule 61"). We have determined that there is no merit to the appeal and, accordingly, affirm the judgment of the Superior Court.

(3) The record reflects that both of Johnson's prior postconviction motions sought relief, in part, on the basis that the Superior Court improperly instructed the jury on accomplice liability. Also, both of the prior motions were ruled on by the Superior Court judge who presided over Johnson's trial ("hereinafter "Trial Judge").³ It appears that the Trial Judge denied Johnson's first postconviction motion on the merits and the second postconviction motion as procedurally barred. Thereafter, on appeal from each of those decisions, this Court affirmed the Superior Court judgment.⁴

(4) In his third motion for postconviction relief, the denial of which is the subject of this appeal, Johnson alleged that the Superior Court erred by

² *Johnson v. State*, 709 A.2d 1158 (Del. 1998).

³ See Del. Super. Ct. Crim. R. 61(d)(1) (providing that the postconviction motion shall be presented to the judge who presided at trial, if that judge is available).

⁴ See *Johnson v. State*, 2008 WL 187949 (Del. Supr.) (affirming denial of first postconviction); *Johnson v. State*, 2009 WL 1658187 (Del. Supr.) (affirming denial of second postconviction motion).

failing to instruct the jury on accomplice liability as required by this Court's 2009 decision in *Allen v. State*.⁵ It appears that Johnson's motion was referred to the Trial Judge who, in turn, referred the motion to a Commissioner for a recommendation. By report dated July 26, 2010, the Commissioner recommended that Johnson's motion should be summarily dismissed as procedurally barred under Rule 61(i) on the basis that the underlying *Allen* claim was without merit.⁶

(5) Thereafter, on August 24, 2010, Johnson filed a "motion for reconsideration" in which he lodged untimely objections to the Commissioner's report (hereinafter "objections").⁷ The objections were referred to the Trial Judge for appropriate disposition.⁸ Before the Trial Judge ruled on the objections, however, a different judge issued an order on August 24, 2010 denying the objections on the merits (hereinafter "the August 24 order").⁹

(6) Ultimately, by order dated September 23, 2010, the Trial Judge, upon *de novo* review (and noting the August 24 order), denied Johnson's

⁵ *Allen v. State*, 970 A.2d 203 (Del. 2009).

⁶ See Del. Super. Ct. Crim. R. 61(i) (listing procedural bars to relief and exceptions thereto).

⁷ Johnson's objections were required to be filed on or before August 5, 2010. See Del. Code Ann. tit. 10, § 512(b)(1)d. (1999); Del. Super. Ct. Crim. R. 62(a)(5)(ii) (providing for ten-day period for filing of objections to Commissioner's report).

⁸ See docket at 254, *State v. Johnson*, Cr. ID No. 9506017339 (Aug. 25, 2010) (docketing and referral of motion for reconsideration).

⁹ *Id.* at 255.

postconviction motion for the reasons stated in the Commissioner's report and recommendation. This appeal followed.

(7) By Order dated February 17, 2011, the Court denied the State's motion to affirm and asked the State to address in its answering brief the procedural anomalies described above, *i.e.*, that a judge other than the Trial Judge and not otherwise assigned to Johnson's postconviction motion ruled on the objections, and that the judge appeared to do so without having reviewed the matter *de novo*, as required by statute and court rule.¹⁰ The Court also asked the State to submit a copy of the objections because the original motion for reconsideration, although listed on the docket, was not included in the Superior Court record.

(8) In response to the Court's concerns, the State in its answering brief advised the Court that, despite a diligent search by Superior Court support staff, the objections could not be located. The State also suggested, based on its communication with Superior Court staff, that the unassigned judge's involvement in the matter was inadvertent. The State argues that the August 24 order is of "no moment" because the objections were untimely

¹⁰ See Del. Code Ann. tit. 10, § 512(b)(1)d.; Del. Super. Ct. Crim. R. 62(a)(5)(iv) (requiring *de novo* determination of Commissioner's report). On its face, the August 24 order did not reflect that the judge had considered the matter *de novo*.

filed and were not properly before the court.¹¹ Under all the circumstances, the Court agrees with the State's position and has disregarded the August 24 order as improvidently issued and the objections as untimely filed.

(9) In his opening brief on appeal, Johnson argues, as he did in his third postconviction motion, that the Superior Court erred when instructing the jury on accomplice liability. We disagree. Having carefully reviewed the record and the parties' briefs on appeal, the Court concludes that the Trial Judge properly denied Johnson's postconviction motion after *de novo* review for the reasons given in the Commissioner's well-reasoned report and recommendation dated July 26, 2010.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Carolyn Berger
Justice

¹¹ Johnson's response to the State's position is unknown because he did not file a reply brief.